Supreme Court, U.S.
FILED

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IN THE

Supreme Court of the United States

October Term, 1994

B & A MARINE CO., INC.,

Petitioner,

against

AMERICAN FOREIGN SHIPPING CO., INC., and
HARRY W. MARSHALL,

Respondents,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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Questioned Presented

1. Whether the Federal Tort Claims Act (Title 28 USC §2671, et seq.) excludes from its application a contractor with the United States, under a General Agency governing sea-going vessels, whose day-to-day activities are not supervised?

2. Should a motion for a summary judgment have been granted in favor of a defendant, in whose sole possession the facts rest, and who has refused to appear for a deposition in the face of a motion in the District Court to compel such appearance, which motion remained undecided, despite plaintiff's requests, for several years and at the time of the decision on the summary judgment?

3. Can a determination that an employee was acting within the scope of employment for purposes of the Federal Tort Claims Act be made without an opportunity given to the opponent to participate in an evidentiary hearing.

List of all Parties

All of the parties in the court whose judgment is sought to be reviewed appear in the caption of the case.

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PETITION FOR A WRIT OF CERTIORARI

Opinions Below

A copy of the opinion of the United States District Court for the Eastern District of New York, dated August 27, 1993, is annexed as part of the appendix. Also annexed as part of the appendix is the opinion of the United States Court of Appeals for the Second Circuit dated May 4, 1994, which affirmed the District Court's judgment. Also annexed is an order of the United States Court of Appeals for the Second Circuit, dated June 24, 1994, which denied a petition for rehearing which contained a suggestion that the action be reheard in banc.

Jurisdiction

(a) The order of the United States Court of Appeals for the Second Circuit which affirmed the granting of the motion for summary judgment was dated and entered on May 4, 1994.

(b) The date of the order denying a rehearing is June 24, 1994; it was entered the same day.

(c) The summary judgment in favor of the Respondents was entered on September 8, 1993.

(d) Jurisdiction to review the judgment in question is conferred by Title 28 USC § 1254 (1).

(e) The basis for federal jurisdiction of the United States Court of Appeals in the first instance is Title 28 USC

§ 1291. The judgment of the District Court is a final judgment that disposes of all claims with respect to all parties. Federal jurisdiction of the District Court was grounded on Title 28 USC §§ 1332 and 1441. The case had been removed to the District Court by the Respondents on the basis of diversity.

Constitution and Statutory Provisions Involved

Constitution, Amendment V; Title 28 USC § 2671, Paragraph 1; Title 28 USC § 2674, Paragraph 1; Title 28 USC § 2679(a), (d)(1), (d)(3); Title 28 USC § 2680(h); FRCP Rule 56(f).

Statement of the Case

The case seeks damages which Petitioner suffered as the result of a letter written by Respondent Marshall to Petitioner's bonding companies. The letter falsely and maliciously stated that Petitioner was in default in performing an agreement for which the bonding companies had supplied the bonds.

The Petitioner is a New York Corporation in the business of marine and industrial repairs in Kings County, New York. The Respondent American Foreign Shipping Co., Inc. ("AFS") is a New Jersey commercial corporation which derives substantial revenue from interstate and international commerce. The Respondent Harry W. Marshall is an officer of AFS and a New Jersey resident.

In September, 1987, Petitioner entered into two separate contracts with the United States Department of Transportation Marine Division ("MARAD"), to perform repairs and modifications on two sea vessels named the SS Cape Ann and the SS Cape Avinor. Petitioner was required to and did obtain bonds to secure performance of the contracts. Thereafter Petitioner commenced to perform the required repairs and modifications.

On February 8, 1988, Respondent Marshall acting for himself and in behalf of AFS wrote a letter to the companies that supplied Petitioner's bonds in which he willfully and maliciously made the false statement that Petitioner was in default with respect to the contracts to repair and modify the vessels. Marshall knew that his letter would influence the bonding companies to refuse to issue additional bonds to Petitioner for work it might secure.

Petitioner thereafter had opportunities to enter into contracts to carry on its business, but the letter of Marshall resulted in the refusal of bonding companies to issue bonds, and Respondent was denied new work, lost old customers and lost opportunities to obtain new customers, all to its damage in the sum of Fifteen Million ($15,000,000.00) Dollars.

The Operation of the Contracts

MARAD appointed AFS as its General Agent to manage and conduct the business of the repair and modification of the vessels without competitive bidding.

Each of Petitioner's contracts had a provision authorizing 4000 excess man hours, but as a result of changes demanded by Respondent and their incompetent management, Petitioner was required to expend over 29,000 excess hours on one of the vessels and over 30,000 excess hours on the other. The additional hours resulted from Supplementary Work Orders by Respondent and their mismanagement.

One example of th Respondents' utter inefficiency arose out of their duty to supply paint. The contracts required the paint to be Devoe G M Products; such paint could be applied at temperatures below freezing. Despite the fact that the paint was to be applied in the dead of a New York winter, the Respondents supplied American Marine Coating Division paint for the Cape Ann and International Paint Inc., products for the Cape Avinor.

The bottom temperature limit for the substituted paint was 50 degrees Fahrenheit. That error held the jobs up for over a week. The Supplementary Work Order requests were of two classes with regard to each of the vessels: negotiated and non-negotiated. Negotiated were those upon which the parties agreed as to the additional price; the prices of non-negotiated Supplementary Work Orders were not agreed to. In any event, negotiated or non-negotiated, Petitioner was required to abide by and follow the Respondents' directions and orders. Each of the directions and orders required additional hours of performance, as did the Respondents' errors and inefficiency.

MARAD claims that the offending letter was authorized by virtue of the order given by George Howard Thurbon, an official of MARAD, who says he instructed Marshall to draft such a letter. The letter was supposed to obtain assur-

ances that Petitioner would complete the contracts and to warn Petitioner that MARAD might have to notify the bonding companies of the possible default.

Thurbon avowed that as a result of the information given to him by Marshall, "I was fully informed of B & A's progress on the contracts". That Marshall was the sole source of Thurbon's information is verified by the fact that Thurbon never visited the sites where the contracts were being performed. The position he took of being fully informed was based entirely on what Marshall told him.

The evidence is clear that Marshall deliberately withheld from Thurbon and MARAD information concerning the vast number of Supplementary Work Orders Marshall issued and the additional hours required to accomplish them and to rectify Respondents' error.

A meeting was held on February 1, 1989, at which Petitioner put forth its claim for the delays and excessive man hours caused by Respondents. Marshall made "Notes" of that meeting, which Thurbon did not attend. Although the notes were dated February 2, 1988, they were put together by Marshall later and the "notes" he took at the meeting are nowhere to be found.

The "Notes" Marshall submitted to Thurbon make no mention of the complaint about the length of time required by Respondents' orders and the inefficiency of the supervision evidenced by the Supplementary Work Orders. Marshall concealed that information from Thurbon.

Petitioner submitted to the meeting on February 1, 1989, the details of the delays and excess man hours caused by the Respondents. All of that was concealed from Thurbon. Marshall prepared "minutes" of the meeting, but the minutes deliberately omitted and concealed the facts of excessive man hours and inefficiencies.

Marshall drew his notes to make it appear that the sole purpose of the meeting was Petitioner's desire for more money. That was false and fraudulent.

Procedural History

It was decided on April 11, 1989, that the case was properly in the District Court. Since the information imparted to MARAD by Respondents was exclusively in the possession of MARAD and Respondents, Petitioner sought to depose Marshall. Marshall balked, but on June 29, 1989, District Judge Constantino directed Marshall to appear for a deposition.

Marshall appeared at the deposition, but when asked about the Supplementary Work Order Requests, the excessive man hours and the activities of Respondents, he walked out of the room and refused to answer questions upon the advice of the Assistant United States Attorney who appeared with him. A motion was thereafter made, returnable on September 20, 1989, to compel Marshall to continue the deposition.

That motion has never been decided, and Respondents have refused to appear for deposition in the absence of an order.

Shortly after the motion to compel the reappearance of the Respondents, the United States Attorney indicated doubt as to whether his office should be in the case. After several status conferences that were aborted because of Judge Constantino's illness, the firm of Kelly Drye & Warren appeared for Respondents on October 5, 1989. Status conferences were again scheduled, and Respondents moved for summary judgment on November 30, 1989.

The death of Judge Constantino caused further delay, and the case, with both motions pending, was assigned to District Judge Raggi, on July 10, 1990. Meanwhile the Petitioner's answering papers, with the demand that Marshall be directed to return to the deposition had been served about February 27, 1990.

Judge Raggi did not hear either of the motions, and the entire case was reassigned to Judge Sterling Johnson on September 11, 1991. The motion for summary judgment was argued before Judge Johnson on April 10, 1993, decided on August 27, 1993, and the order was entered on September 2, 1993.

The Appointment and Duties of American Foreign Shipping Co., Inc.

On August 1, 1984, MARAD and American Foreign Shipping Co., Inc. ("AFS") entered into a Service Agreement under which AFS would act as MARAD's General Agent in managing and conducting the maintenance and repair of ships for the "Ready Reserve Force".

The Respondents claimed that the contracts were awarded to AFS by virtue of approval by Admiral Shear. The very memorandum upon which Respondents relied pointed out that it was intended that AFS act on its own without supervision. The Memorandum states:

> "Historically, General Agents have been responsible for providing a number of support services to assigned vessels, however, the basic service is to activate, man and operate the vessel in accordance with Government directives."

After stating that General Agents are appointed on the basis of their "understanding of the vessels' condition, records, operating requirements and probably employed personnel experienced in the operation of the ship", the Memorandum goes on to describe increased sealift requirements and reports:

> "These actions contemplate a more active role by the General Agent in the ship retention and upkeep process, and the assignment by the General Agent of specific resources in the form of in-house or support services to provide timely handling of each ship assigned."

The Service Agreement directed AFS to act as MARAD's representative for on-site administration and inspection of the ships assigned, and included supervision and direction of repair work and modification of ships.

The Service Agreement contains six pages of description of the General Duties of the General Agent. It gives to the

General Agent the power to act "in accordance with good and reasonable commercial practices".

AFS is required to procure the master of the vessel with the approval of the United States, but it alone provides the crew and officers without the approval of the United States.

If the United States has a complaint against a crew member, it is AFS which investigates and determines the validity of the complaint.

AFS is required to equip and victual the vessels, assign personnel and coordinate activities with shipyards, port authorities and local service organizations.

Significantly, AFS may even appoint port agents when it believes obtaining approval of the United States would be impractical.

AFS is required to exercise diligence in accordance with good commercial practices to keep the vessel in an efficient state.

AFS even has the right to employ sub agents.

The Service Agreement also provides that AFS would be liable to the Government for damages caused by willful misconduct or gross negligence in the selection of officers and principal supervisory personnel.

The Agreement could be terminated by the Government without cause upon 30 days notice or sooner if required to protect the Government's interest.

A listing of all of the independent duties performed under its contract demonstrates that AFS exercised such non-supervised duties as brings it within the status of independent contractors who are not made immune by the Federal Tort Claims Act.

When District Judge Johnson decided the motion for summary judgment in favor of Respondents, he held no hearing and took no evidence to determine the relationship of AFS and Marshall to MARAD. He gave no notice that he would consider the problem of whether they were employees. Nevertheless, he decided that Marshall and AFS were acting in the scope of their employment and were thus immune from suit.

REASONS FOR GRANTING THE WRIT

I

The Respondents are excluded from the coverage of the Federal Tort Claims Act

It was error to grant summary judgment in favor of Respondents, on the ground that the Federal Tort Claims Act, 28 USC §§ 2671 et seq., bars such actions against employees of the United States acting within the scope of their office.

The Federal Tort Claims Act excludes from its coverage organizations like AFS which are contractors with the United States and such contractors' employees as well.

The Act itself provides exclusions of contractors with the United States. 29 USC § 2671, Paragraph 11, provides:

> "As used in this chapter and sections 1346(b) and 2401(b) of this title, the term 'Federal agency' includes the executive departments, the judicial and legislative branches, the military departments, independent establishments of the United States, and corporations primarily acting as instrumentalities or agencies of the United States, but does not include any contractor with the United States."

This Court has declared that day-to-day supervision was required for one to qualify for protection under the Act as an employee. In *United States v. Orleans*, 425 US 807, 48 L.Ed.2d 390, 96 S.Ct. 1971 (1976), this Court held that a community action agency which received federal funds and was required to comply with federal standards was not a federal agency or employee within the meaning of the Act.

The District Court in that case found that the claimed agency was created for the purpose of carrying out community action programs contained in the Economic Opportunity Act of 1974; that the agency received no funds other than from the Federal Office of Economic Opportunity ("OEO"); that the agency conducted only programs formulated and founded by the federal government, and that the OEO closely supervised the agency and its activities. More, the agency in that case differing from AFS, was a non-profit corporation.

The Court held that the day-to-day activities were not so closely supervised as to convert this private corporation into

a government agency. Mr. Chief Justice Burger, writing for the unanimous Court, stated (425 US 812, 816, 48 L.Ed.2d 399):

> "Billions of dollars of federal money are spent each year on projects performed by people and institutions which contract with the Government. These contractors act for and are paid by the United States. They are responsible to the United States for compliance with the specifications of a contract or grant, but they are largely free to select the means of its implementation. Perhaps part of the cost to the Government often includes the expense of public liability insurance, but that is a matter of either contract or choice. The respondents did not sue the community action agency itself. Similarly, by contract, the Government may fix precise conditions to implement federal objectives. Although such regulations are aimed at assuring compliance with goals, the regulations do not convert the acts of entrepreneurs—or of state governmental bodies—into Federal Governmental acts. Cf. *Jackson v. Metropolitan Edison Co.*, 419 US 345, 42 L.Ed.2d 477, 95 S.Ct. 499 (1974); *Moose Lodge No. 107 v. Irvis*, 407 US 163, 32 L.Ed.2d 627, 92 S.Ct. 1965 (1972).

Federal funding reaches myriad areas of activity of local and state governments and activities in the private sector as well. It is inconceivable that Congress intended to have waiver of sovereign immunity follow congressional largesse and cover countless unidentifiable classes of 'Beneficiaries'. The Federal Government in no sense controls 'the detailed physical performance' of all the programs and proj-

> ects it finances by gifts, grants, contract, or loans. *Logue v. United States*, 412 US, at 528, 37 Ed.2d 121, 93 S.Ct. 2215."

Justice Burger added in a footnote that it was irrelevant whether the program was funded by means of a contract or a grant (425 U.S. at p. 816, 48 L.Ed.2d at p. 399).

In the case at bar, it is irrelevant that the Agreement (16a) names AFS as an agency, "not an independent contractor" (16a). Its functions were described in the Service Agreement and specifically delineated in the Memorandum of MARAD's Associate Administrator dated July 3, 1984, upon which Admiral Shear acted in the appointment of the corporate Respondent as General Agent.

The Memorandum states that the contract between the parties authorizes the General Agent to manage and conduct the business of "Government-owned" vessels, with basic service such as "to activate, man and operate" the vessel in accordance with Government directives.

In addition, the contractor assists in "regularly body inspection, repairs, specification preparation and a number of other retention related services". In that regard, the contractor enters into and maintains collective bargaining agreements with seafaring unions.

The Associate Administrator also pointed out that it was important that the General Agent have and assign specific resources in the form of in-house or support services. To make it possible for the contractor to provide these day to day services without the necessity of MARAD's interven-

tion, MARAD's Associate Administrator recommended the payment of a fixed fee for ships in inactive status and an increased fee for ships placed in operation.

To satisfy the need for such in-house support services, the Service Agreement also provided that the Respondents could hire sub agents and sub-contractors on such terms and for such periods as the Respondent deemed necessary to be included in the costs to be reimbursed by the United States.

On this point, the decision sought to be reviewed could wreak havoc on established relationships in the maritime industry. The decision runs counter to the general belief in the industry that a General Agent is not an employee. While an employee of a ship owner is understood to have payment for his services secured by a maritime lien (*The Englewood*, 57 F.2d 31 [D.C.N.Y., 1932]), no such right is afforded a General Agent, who is not even presumptively entitled to a maritime lien for its services (*The M. Vivian Pierce*, 48 F.2d 674 [D.C. Mass., 1931]).

The Circuit Court of Appeals also departed from its own decision on the need for detailed supervision to qualify for exemption from liability.

In *Leone v. United States*, 910 Fed.2d 46 (2d. Cir., 1990) that Court considered whether private physicians designated by the Federal Aviation Administration were employees of the government for purpose of the Federal Tort Claims Act. These physicians examined would-be pilots to determine whether they satisfied Federal Aviation Regulation Medical standards. It tested the issue by applying "conventional agent relationships" and decided (910 F.2d at p. 50):

> "The plaintiffs-appellees, however, fail to appreciate that such detailed regulations and evaluations are an insufficient basis to satisfy the strict control test. See *Letnes v. United States*, 820 F.2d 1517, 1519 (9th Cir. 1987). The question is not whether a contractor must comply with federal standards, but whether its day-to-day operations are supervised by the Federal Government. See *Orleans*, 425 U.S. at 815, 96 S.Ct. at 1976; see also *Charlima*, 873 F.2d at 1081; *Brooks v. A.R. & S. Enterprises*, 622 F.2d 8, 11 (1st Cir. 1980). Thus, while the FAA acts generally as an overseer, it does not manage the details of an AME's work or supervise him in his daily duties. Indeed, neither the supervision provided by the Federal Air Surgeon nor the FAA procedures to evaluate the AMEs entail on-site review or day-to-day management. Accordingly, the FAA does not maintain the type of control over the AMEs that is required by *Logue* (412 U.S. 521, 93 S.Ct. 2215, 37 L.Ed.2d 121 [1973]) and *Orleans* (425 U.S. 807, 96 S.Ct. 1971, 48 L.Ed.2d 390 [1976])."

District Judge Wexler in the Eastern District of New York held in *Crippen v. Nelson Realty*, 572 F.Supp. 87 (1983) that a contractor with the Housing and Urban Development Department (HUD) was among the contractor exemptions from the Act.

In a contract similar in concept to the Service Agreement, Nelson Realty was hired to preserve, protect, operate and maintain a parcel of property. As in the case at bar, day-to-day operations and supervision of employees were in the hands of the agent, while it was required to conform to specific federal laws and regulations. The District Court

held that the "determinative factor is control and operation of the property".

So, in this case, the control and operation of the vessels, their manning, the supervision of the repairs and modifications were all within the duties of Respondents.

The Service Agreement imposes upon Respondents duties of a general agent, and for that reason AFS is called a "General Agent" by the Associate Administrator of MARAD. The common understanding of a general agent is that he has latitude in the exercise of his duties. As is stated at 3 *Am. Jur.2d Agency* § 91:

> "The powers of an agent are particularly broad in the case of one acting as a general agent or manager; such a position presumptions a degree of confidence reposed and investiture with liberal powers for the exercise of judgment and discretion in transactions and concerns which are incidental or appurtenant to the business entrusted to his care and management."

Having found that AFS was appointed as a General Agent, The Courts below departed from accepted standards when it found Respondents to be employees.

II

The finding without an evidentiary hearing that Respondents were employees violated petitioner's due process rights and conflicts with other Courts of Appeals

The Circuit Court of Appeals' affirmance of the finding without an evidentiary hearing that Respondents were employees is in conflict with decisions of other United States Courts of Appeals on the same matter.

The Federal Tort Claims Act has a provision (Title 28 §2679) which states that the Attorney General may certify that a defendant employee was acting within the scope of his employment. Such a certification would be the determination of an issue of fact, which would effectively result in a dismissal of the entire case. In *Nasuti v. Scannell*, 906 F.2d 802, 813 (1st Cir., 1990), the Court held that there was a separation of powers problem if the Attorney General was the sole judge of an issue determinative of a court's jurisdiction.

Accordingly, the Courts of Appeals in several circuits have determined that a judicial hearing is required to make such a determination.

The Circuit Court of Appeals for the 9th Circuit held in *Wang v. United States*, 947 F.2d 1400 (1991) that a party is entitled to a full hearing on whether a defendant was acting within the scope of his employment to enjoy immunity under the Federal Tort Claims Act (28 USC § 2671[b][1]), saying (p. 1402):

> " . . . absent extraordinary circumstances, plaintiffs must be provided with a full and fair opportunity to participate in evidentiary hearings on whether a defendant will be certified an 'employee' of the United States acting within the scope of his employment."

The Court also stated that the government conceded that point on appeal in accord with decisions of other Circuits, citing *S.J. & W. Ranch, Inc. v. Lehtinen*, 913 F.2d 1538, 1542, (11th Cir. 1990), amended 924 F.2d 1555, cert. den. ____ U.S. ____, 112 S.Ct. 62, 116 L.Ed.2d 37 (1990); *Melo v. Hafer*, 912 F.2d 628, 641 (3rd Cir. 1990) affd. ____ U.S. ____, 112 S.Ct. 558, 116 L.Ed.2d 301 (1991); *Hamrick v. Franklin*, 931 F.2d 1209, 1211-12 (7th Cir. 1991); *Nasuti v. Scannell*, 906 F.2d 802, 813 (1st Cir. 1990); *Arbour v. Jenkins*, 903 F.2d 416, 421 (6th Cir. 1990).

In the face of the fact that no adversarial hearing was held, the opinion of the majority, that the District Court's ruling "complied with the certification requirement", puts the Second Circuit at odds with holdings of the 9th Circuit, the 11th Circuit, the 3rd Circuit, the 7th Circuit, the 1st Circuit and the 6th Circuit.

The requirement for a hearing rests on a constitutional base, and the denial of such a hearing is a denial of due process.

Within the jurisdiction of the Second Circuit there are holdings that articulate the constitutional base. In *Petrowsky v. United States*, 728F.S. 890 (N.D.N.Y., 1990), Judge Munson wrote (892-893):

> "This court's constitutional concerns both relate to the guarantee of due process under the law. *See* U.S. Const. amend. V. For there to be a due process violation: plaintiff must have a property right; there must be government action amounting to a deprivation; and it must be demonstrated that the depravation occurred without due process. *Rosa R. v. Connelly*, 889 F.2d 435, 438 (2d Cir. 1989). The court holds that plaintiff has a constitutionally recognized property interest in the present lawsuit and/or the damages he seeks in this suit. ...
>
> To hold otherwise would be to determine that a litigant is not entitled to due process from the nation's courts, either state or federal. With respect to the second requirement, the court concludes that the government action which amounts to a deprivation is the certification performed by the Assistant United States Attorney. If given deference, it effectively terminates plaintiff's lawsuit, even though the Order of this court is the instrument which would actually terminate the litigation."

The constitutional base would seem to demonstrate the error in the concurring opinion of District Judge Glassner, who gave deference to a letter of the United States Attorney and would treat that as a "certification". A similar ruling, contrary to Judge Glassner's holding, appears in *McHugh v. University of Vermont*, 758 F.S. 945, 950 (D.C.VT, 1991), where District Judge Parker said:

> "Second, the certification process allows the government to impermissibly combine investigatory and

> adjudicative functions. This creates the appearance of bias that is also suspect for due process reasons."

Grievously affecting Petitioner's rights as well was the ignoring by the Court of Appeals of the Petitioner's motion to depose Respondents. Federal Rule of Civil Procedure 56(f) provides that if a party cannot for reasons stated present facts to oppose a motion for summary judgment the court may order depositions to continue and deny the motion for summary judgment or grant a continuance.

Part of Petitioner's response to an order to show cause which preceded the motion for summary judgment was its plea that the motion for discovery be granted. It stated:

> "The defendants' actions have so far prevented plaintiff from conducting meaningful discovery, which will demonstrate the defendants' perfidy."

Petitioner concluded with a request that Respondents be ordered to appear and be deposed.

The need for discovery in a case such as this was recognized by the Court of Appeals for the Eleventh Circuit, when it concluded its decision in *S.J. & W. Ranch, Inc. v. Lehtinen*, 913 F.2d 1538, 1544, affd. ____ U.S. ____ , 112 S.Ct. 558, 116 L.Ed.2d 301 (1991) with the statement:

> "On remand the district court should conduct a de novo hearing on whether defendant Lehtinen's conduct occurred within the scope of his employment and permit the plaintiff full discovery on the scope question."

The request for discovery was not mere posturing in this case. It would have revealed that the Respondents' offending letter resulted from acts beyond their employment.

The determination of whether acts are within the scope of employment is conducted by principles of state law *(Williams v. United States,* 350 U.S. 857, 76 S.Ct. 100, L.Ed. 761 (1955).

Petitioner has claimed throughout that the letter resulted from the acts of Respondents in concealing from MARAD the facts of the Supplementary Work Orders and the excessive hours they consumed, as well as the errors of Respondents which added to the delays. The concealment was intensified when Marshall failed to apprise MARAD of Petitioner's complaints and made it appear that Petitioner was merely requesting additional money. The purpose of the concealment was to prevent MARAD from becoming aware of how badly Respondents were performing.

The letter was addressed and sent to Petitioner and its bonding company in New York. The law in New York is clear. Where an intentional tort is committed for the personal purposes of the agent, the act is not within the scope of employment. In *Horowitz v. Sears Roebuck & Co.* , 137 App. Div. 2d 492, 542 N.Y. Supp. 2d 236 (1988) the Court observed:

> "However, if the employee's act was committed for solely personal ends, rather than in furtherance of or as incident to the employer's business, liability for the acts may not be imputed to the employer *(Island Associate Corp. v. Hartman,* 118 A.D. 2d 830, 500

N.Y.S. 2d 315; *Iazzetta v. State of New York*, 115 A.D. 2d 518, 499 N.Y.S. 2d 48, lv. denied 67 NY. 2d 605, 501 N.Y.S. 2d 1023, 492 N.E. 2d 794).

In the case at bar, the motivation of the salesman in defacing the plaintiff's appliances with swastikas, though unstated, can logically support only one inference; namely that it was soled personal to him and in no way related to the furtherance of his employer's business. As such, no triable issue of fact remained for the jury concerning whether this act fell within the scope of his employment."

The law in New York for at least 150 years has been that it is the duty of an agent to keep his principal informed of all facts which might conceivably affect the principal's property or judgment *(Edmonstone v. Hartorne*, 19 N.Y. 9 (1859)).

And when he has had information that he concealed from principal for his own purposes, the agent has been uniformly condemned. In Robert *Reis & Co. v. Volck*, 151 App. Div. 613, 136 N.Y. Supp. 367 the court described the obligations of an agent to his principal, saying:

"An instructive and able opinion as to the duty of an agent to his principal was that delivered by Sanborn, Circuit Judge, for the United States Circuit Court of Appeals, Eight circuit, in *Trice v. Comstock*, 121 Fed 620, 57 C. C. A. 646, 61 L. R. A. 176. He said:

'For reasons of public policy founded in a profound knowledge of the human intellect and of the motives

> that inspire the actions of men, the law peremptorily forbids every one who in a fiduciary relation has acquired information concerning or interest in the business or property of his correlate from using that knowledge or interest to prevent the latter from accomplishing the purpose of the relation.' "

Pious expressions of Respondents that they were protecting the interest of the United States does not relieve them from the results of concealment from their principal. It was squarely said in *Town of Irondequiot v. Johnson*, 231 App. Div., 254, 247 N.Y.S. 581 (1931):

> "However wide the scope of the general agency, we cannot suppose as an incident an authority to obtain results by means of fraud."

In the absence of notice that the District Court would determine the question of scope of employment and the lack of opportunity to depose Respondents, the finding in the case of scope of employment violates the Petitioner's due process right under the Fifth Amendment.

CONCLUSION

The petition for a Writ of Certiorari should be granted

Respectfully submitted,

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APPENDIX A—Opinion and Order of the United States Court of Appeals, Second Circuit dated May 4, 1994.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 1198—August Term, 1993

(Argued: March 3, 1994 Decided: May 4, 1994)

B&A MARINE CO., INC.,

Plaintiff-Appellant,

v.

AMERICAN FOREIGN SHIPPING CO., INC. and HARRY W. MARSHALL,

Defendants-Appellees.

Docket No. 93-9023

Before: Kearse and Leval, *Circuit Judges*, and Glasser, *District Judge*.*

*Hon. I. Leo Glasser, United States District Judge for the Eastern District of New York, sitting by designation.

B&A Marine Co., Inc. appeals from an order of the United States District Court for the Eastern District of New York (Sterling Johnson, Jr., J.) which granted summary judgment to the defendants, American Foreign Shipping Co., Inc. and Harry W. Marshall, on the grounds that the Federal Tort Claims Act, 28 U.S.C. §§ 2671 *et seq.*, bars claims alleging libel against employees of the United States acting within the scope of their employment. Affirmed. Judge Glasser concurs in a separate opinion; Judge Kearse concurs in both opinions.

CHARLES HAYDON, New York, N.Y. (Dublirer, Haydon, Straci & Victor, New York, N.Y.), for *Plaintiff-Appellant.*

ROBERT E. CROTTY, New York, N.Y. (Russell G. Bogin, Kelley Drye & Warren, New York, N.Y.), for *Defendants-Appellees.*

LEVAL, *Circuit Judge:*

This is an action alleging libel brought against an agent of the United States Government, and an employee of the agent. The District Court for the Eastern District of New York, Sterling Johnson, Jr., J., granted summary judgment for the defendants because the Federal Tort Claims Act, 28 U.S.C. §§ 2671 *et seq.*, bars such actions against employees

of the United States acting within the scope of their office or employment. 28 U.S.C. § 2679(b)(1). We affirm.

Background

On August 1, 1984, the United States, acting through the Department of Transportation, Maritime Administration ("MARAD"), entered into a service agreement with the defendant American Foreign Shipping Co., ("AFS"). Pursuant to the agreement, the United States appointed AFS "*as its agent, and not as an independent contractor,*" to manage and conduct the maintenance and repair of vessels in the Ready Reserve Force.[1] (emphasis added).

In September of 1987, Plaintiff B&A successfully bid for a contract with MARAD to refit the S.S. Cape Ann and S.S. Cape Avinof, both a part of the Ready Reserve Force. Pursuant to B&A's agreement with MARAD, B&A's work on these ships was to be supervised by AFS. Sometime after it undertook the work, B&A began to encounter severe cost overruns and substantial delays; B&A attributed these problems to inclement weather, and to AFS's neglect and lack of cooperation. Faced with an inability to meet its contractual deadlines for delivery, B&A requested a meeting with MARAD and AFS to resolve its performance difficulties.

On February 1, 1988, B&A representatives met with defendant Captain Harry W. Marshall, the President of AFS, and with three MARAD officials. After the meeting, MARAD instructed Marshall to draft a letter to B&A seeking assurances that B&A would complete the contracts and warning B&A that it might be necessary for MARAD to notify B&A's bonding companies of the possibility of de-

[1]This consists of ships that can be used in case of national emergency.

fault. Marshall prepared a draft, which included the following language:

> In the event that you are unable to immediately provide assurances satisfactory to us as to your ability and resources to complete the Contracts on the subject vessels, we consider it prudent to alert your bonding companies of the possibility of default in the performance of the Contracts.

Marshall showed the draft to MARAD. MARAD redrafted the letter and returned it to Marshall with instructions to type MARAD's redraft on AFS stationery. MARAD's redraft included the following language:

> B&A Marine Co., Inc. has placed itself in a default situation by falling behind the contract schedule. MARAD is hereby notifying the appropriate insurance companies by copy of this letter that B&A Marine Co., Inc. is in default of its contract obligations.

Marshall incorporated MARAD's changes into a revised letter, which he resubmitted to MARAD. MARAD approved the letter and instructed Marshall to send it to B&A and its sureties; Marshall followed these instructions. The letter was signed by Marshall; the signature block indicated that it was sent by AFS as general agent on behalf of MARAD

In February of 1989, B&A commenced this action in Supreme Court, Kings County, New York against Marshall and AFS alleging that Marshall acting individually and on behalf of AFS, "willfully, maliciously, wrongfully and intentionally made the false statement that [B&A] was in default" of its obligations under its contract with MARAD.

The complaint alleged that the statement prompted B&A's bonding companies to refuse to issue bonds to B&A in connection with substantial business opportunities, resulting in $15,000,000 in damages.

AFS and Marshall removed the action to federal court on the basis of diversity of citizenship and moved for summary judgment. The district court ordered B&A and the United States to show cause why the United States should not be substituted as defendant in place of AFS and Marshall under § 2679(d) of the Federal Tort Claims Act ("FTCA").

B&A responded that the United States should not be substituted for several reasons, including that the defendants were not acting within the scope of their employment, that the Government was not liable as it had not waived immunity for libel claims, and that the private defendants were not immune because the immunizing provisions of § 2679 were made inapplicable to a libel action by § 2680(h). The Government responded that the United States should not be substituted as a defendant because, under § 2680(h), it did not waive sovereign immunity for claims of libel; AFS & Marshall asked the court to rule that they had acted within the scope of their employment and to dismiss the action because § 2679(b)(1) precludes a civil action against an employee of the Government who has committed a tort while acting within the scope.

On August 27, 1993, the court granted defendants' motion for summary judgment. The court ruled that Marshall and AFS were employees of the United States within the meaning of the FTCA, 28 U.S.C. § 2671; that they acted within the scope of their employment in the sending of the allegedly libelous letter; and that they were therefore immune from tort liability under 28 U.S.C. § 2679. The court did not substitute the United States as defendant. Although no explanation was given, it is clear this was because the

United States is immune from suit for libel under § 2680(h) of the FTCA.

Discussion

The FTCA is a limited waiver of sovereign immunity, making the Federal Government liable to the same extent as a private employer for certain torts of "employees" acting within the scope of their employment. *See United States v. Orleans*, 425 U.S. 807, 813 (1976); *Leone v. United States*, 910 F.2d 46, 48-49 (2d Cir. 1990), *cert. denied*, 499 U.S. 905 (1991). At the same time as it offers the liability of the United States to compensate victims of such torts, the Act also provides that:

> [t]he remedy against the United States . . . for . . . personal injury . . . arising or resulting from the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment is exclusive of any other civil action or proceeding for money damages . . . against the employee whose act or omission gave rise to the claim . . . . Any other civil action or proceeding for money damages arising other civil action or proceeding for money damages arising out of or relating to the same subject matter against the employee . . . is precluded . . . . 28 U.S.C. § 2679(b)(1).

To emphasize the exclusivity of the remedy against the United States under the FTCA, § 2679(d) requires that the United States be substituted as the party defendant upon certification by the Attorney General or the court that the defendant employee was acting within the scope of his employment.

The Act defines "[e]mployee of the government" as including "officers or employees of any federal agency," and "federal agency" is defined as including "corporations primarily acting as instrumentalities or agencies of the United States but does not include any contractor with the United States." 28 U.S.C. § 2671. Thus, the FTCA explicitly excludes liability of the Government for the wrongful act or omission of an independent contractor. *See, e.g., Logue v. United States*, 412 U.S. 521, 526-27 (1973); *Berkman v. United States*, 957 F.2d 108, 111 (4th Cir. 1992). The court accordingly must determine: (1) whether the tortfeasors were acting in the role of employee of the Government or independent contractor, within the meaning of the FTCA, and (2) if they were employees, whether they were acting within the scope of their employment.

For purposes of the FTCA, the common law of torts and agency defines the distinction between an independent contractor (for whose torts the Government is not responsible) and an employee, servant or agent (for whose torts the Government is responsible). The Restatement (Second) of Agency provides helpful guidance. It defines a servant as "an agent employed by a master to perform service in his affairs whose . . . performance of the service is controlled or is subject to the right to control by the master." *Restatement (Second) of Agency* § 2(2) (1958). If the court determines that the wrongdoer is an agent or employee of the Government who committed a tort within the scope of the employment, then the plaintiff may not recover from the agent or employee, but ordinarily has a claim against the Government. If, on the other hand, the tortfeasor is not an agent or employee of the government, or is an agent or employee but did not commit the wrongdoing in the scope of the employment, then the plaintiff has a cause of action

against the agent or employee in his individual capacity, but not against the Government.

I. *Agency Status Under the FTCA*

The district court concluded that Marshall and AFS were employees of the government acting within the scope of their employment. B&A contends this was error and that there were genuine issues of material fact for trial concerning AFS's agency. We reject this contention. As Marshall was an employee of AFS, it is *AFS's* status with respect to the Government that is critical. The evidence presented to the district court on the motion for summary judgment showed as a matter of law that AFS was an agent of the Government, and not an independent contractor.

In the first place, the contract between MARAD and AFS expressly provided that AFS would serve "as [MARAD'S] agent, and not as an independent contractor." By entering into this agreement, the Government was agreeing to make itself liable for AFS's torts committed within the scope of its agency. B&A points to no reason why the agreement should not be accepted at face value on this point.

Secondly, other details of the agreement confirm that it created an agency relationship. Courts have found it indicative of an agency relationship if the Government enjoys the "power 'to control the detailed physical performance of the contractor,' " Orleans, 425 U.S. at 814 (quoting *Logue v. United States*, 412 U.S. 521, 528 [1973]), or if the Government in fact supervises the "day-to-day operations." *Orleans*, 425 U.S. at 815. *See also Logue*, 412 U.S. at 528; *Leone*, 910 F.2d at 50. The agreement required AFS "to manage and conduct the business for the United States *in accordance with such directions, orders* or regulations . . . *as the United States* may from time to time *prescribe* . . . ."

(emphasis added). The agreement further provided that a MARAD representative would monitor AFS's performance. These provisions unquestionably establish the Government's contractual authority to control AFS's performance in detail.

Third, the evidence of the working relationship between MARAD and AFS further confirmed that such power resided in the Government. The affidavits of Marshall and of George H. Thurbon, who was assigned by MARAD to supervise AFS's performance, clearly showed that MARAD instructed AFS in detail as to what actions it should take in advising B&A of its default.

Finally, B&A submitted no evidence suggesting the existence of a triable issue of fact on this point. Under the circumstances, the district court was completely justified in concluding that the "employee" status of AFS and Marshall had been established as a matter of law.

II. *Lack of Competitive Bidding*

B&A also contends, relying on 46 U.S.C. § 2303 (a), that AFS could not properly be found to be an employee under the FTCA because it was not hired through competitive bidding. B&A's reliance on § 2303(a) is misplaced. That section requires the use of competitive procedures in "the procurement . . . of . . . all services" by the Coast Guard. The section does not mention MARAD. Although the Coast Guard, like MARAD, is part of the United States Department of Transportation, the inclusion of the Coast Guard in § 2303 does not appear to have been intended to subject the Department of Transportation or MARAD to that section's requirements. Rather, MARAD appears to be governed by 41 U.S.C. §253, which requires competitive procurement of all public contracts, except when "made inapplicable pur-

suant to section 474 of Title 40." 41 U.S.C. § 252. Section 474 exempts MARAD from competitive bidding when "necessary and appropriate." *See also* 48 C.F.R. Subpart 1201.103 (exempting MARAD from Department of Transportation regulations "as authorized by 40 U.S.C. § 474(16)"). B&A does not dispute that MARAD complied with the procedures necessary for dispensing with competitive bidding. The argument that the contract was a nullity is meritless.[2]

III. *The Scope of the Employment.*

It was equally clear under the evidence presented to the district court that the writing and sending of the allegedly tortious letter were within the scope of the defendants' employment. This was unquestionably a part of AFS's management of the maintenance and repair of MARAD's vessels, which was precisely the task for which the agency was created. Furthermore, the uncontradicted evidence demonstrated that, in writing the letter, and in particular the allegedly libelous portion of the letter, AFS was carrying out the explicit instructions of its principal. Thus, it is not seriously open to dispute that the sending of the letter was within the scope of the employment.

IV. *The Effect of the Immunity of the Government on the Liability of the Employee-Tortfeasor.*

B&A argues that the FTCA requires that either the Government or the employee be liable for torts committed by employees of the Government within the scope of their

[2]Because the argument in any event has no merit, we do not reach the question whether B&A, which was not a competing bidder, has standing to complain of the contract award procedure.

employment. B&A acknowledges that the Government cannot be liable, because Section 2680 excludes its liability for libel (as well as for most intentional torts, claims arising in a foreign country, and a variety of other claims). However, B&A contends that, in the absence of a remedy against the Government, the provisions of Section 2679(b)(1) making the remedy against the United States exclusive of any civil action against the employee should be inoperative. Thus, it argues that where a plaintiff has no remedy against the Government because the particular tort is not covered by the Federal Tort Claims Act, the plaintiff should not also lose its claim against the employee and be left remediless.

The argument has considerable force and is strengthened by a literal reading of the statute. Section 2680 withholds liability of the government by asserting, "The provisions of this chapter [Chapter 171] and section 1346(b) of this title *shall not apply to* . . . [a]ny claim arising out of . . . libel . . ." (as well as a variety of other torts and circumstances). 28 U.S.C. § 2680 (emphasis added). Section 2679(b)(1), which makes the remedy against the United States exclusive and precludes any action against the employee, is a part of the same chapter; it is among the "provisions of this chapter" which Section 2680(h) makes inapplicable to a libel claim. A literal reading therefore seems to command the conclusion that where Section 2680 forecloses liability of the United States, the exclusivity provision § 2679 is inapplicable, the liability of the employee survives, and the tort victim is not left remediless.

The principal problem with B&A's argument is that the Supreme Court has ruled to the contrary. In *United States v. Smith*, 499 US 160 (1991), an alleged victim of medical malpractice committed by an Armed Forces doctor in Italy sought to impose liability on the individual tortfeasor, where the exception provision of Section 2680 (k) made the FTCA inapplicable to a "claim arising in a foreign coun-

try." The Supreme Court ruled, based on the exclusivity provision of Section 2679(b)(1), that the Government employee was protected from liability, even where the Government had no liability. The Court did not address the opening clause of Section 2680, which appears to make the exclusivity provision of Section 2679(b)(1) inapplicable to a "claim arising in a foreign country." The Supreme Court's ruling forecloses B&A's argument. The Court expressly recognized that the effect of its ruling was to leave certain tort victims without any remedy either against the Government or against the employee-tortfeasor. The Court found that this was the intention of Congress. We therefore conclude that B&A is precluded from asserting a libel action against AFS and Marshall based on a tort they may have committed as agents or employees of the Government within the scope of their employment, notwithstanding that the United States is also immune. *See also Brown v. Armstrong*, 949 F.2d 1007, 1012-13 (8th Cir. 1991); *Mitchell v. Carlson*, 896 F.2d 128, 134-36 (5th Cir. 1990).

V. *Lack of Certification*

B&A also argues that the district court's judgment should be reversed on the ground that the defendants failed to obtain certification of the Attorney General pursuant to Sections 2679(d)(1) & (2). Section 2679 provides that upon certification by the "Attorney General that the defendant employee was acting within the scope of his office or employment," the United States "shall be substituted as the party defendant," 28 U.S.C. § 2679(d)(1), the action shall be removed to federal court (if necessary) and the "action or proceeding shall be deemed to be an action or proceeding brought against the United States under the provisions of this title . . . ." Id. § (d) (2).

The Assistant U.S. Attorney's letter submitted in response to the order to show cause did not contain an assertion that AFS and Marshall were acting within the scope of their employment (although the letter implied as much).[3] Nonetheless, in the absence of a certification by the Attorney General, the statute permits the court to certify. *Id. § 2679(d)(3)*.[4] The court's ruling that AFS and Marshall were employees of the Government acting within the scope of their employment sufficiently complied with the certification requirement.

* * *

We have considered B&A's other contentions and find them to be without merit.

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[3]In all likelihood, the Assistant deliberately avoided making this "certification" because the statute provides that upon such "certification by the Attorney General . . . the United States shall be substituted as the party defendant," 28 U.S.C. § 2679(d)(1), and the Assistant was seeking to avoid having the United States substituted as the defendant.

[4]The statute provides that the employee may "petition the court [upon notice to the Government] to find and certify that the employee was acting within the scope of his office or employment." 28 U.S.C. § 2679(d)(3). In their brief in response to the order to show cause, AFS and Marshall asked the court to so find. Thus, even if the statute should be read to prohibit the court from making the certification under Section 2679(d)(3) on its own motion, the brief filed by AFS and Marshall would serve as the "petition." It is true that the petition was not served on the Government in the manner required by the statute (with notice to the Attorney General). *See* 28 U.S.C. § 2679(d)(3). The Government might therefore have disregarded the petition or moved to set it aside. It chose, however, to waive the defect in service and defend on the merits against being substituted on the ground that the United States has no liability under the FTCA for libel claims.

Conclusion

The judgment of the district court is affirmed.

GLASSER, J., Concurring:

I concur in the result although differing with the majority as to the route by which that result was reached in two respects. First, B&A argues that if the government continues to be immune from an action for intentional tort (libel being such a tort) there is no remedy against the United States. If it is only the existence of such remedy which precludes an action against the employee pursuant to 28 U.S.C. § 2679(b)(1), then the statutory preclusion should be inoperative and the action against the defendant employees should lie. Were this not so, B&A contends, federal employees acting within the scope of their employment could commit intentional torts with impunity leaving their victims without recourse. Although this contention has logical consistency and appeal as far as it goes, it does not go far enough in that it fails to take account of 28 U.S.C. §§ 2679(d)(1), (4) and 1346(b).

Effective November 18, 1988, Congress enacted the Federal Employees Liability Reform and Tort Compensation Act ("The Act" or "The Westfall Act" or "The Liability Reform Act"), P.L. 100-694. The declared purpose of that Act was to protect federal employees from the potential liability to which they were exposed as a result of the decision in *Westfall v. Erwin*, 484 U.S. 292 (1988), which dramatically changed the law by which the personal liability of federal employees was governed. Prior to *Westfall* federal employees were absolutely immune from personal liability for common law torts so long as they were acting within the scope of their employment at the time the injury occurred.

Westfall decided that federal employees must have been acting within the scope of their employment and, in addition, must have been acting in the exercise of governmental discretion. 484 U.S. at 297-98. Included in the opinion in *Westfall* was the observation that Congress was in the best position to determine the extent to which federal employees should be personally liable for common law torts and that legislative consideration of the matter would be useful. *Id.* at 300. Congress responded to that suggestion and enacted the Westfall Act.

Section 5 of that Act amended 28 U.S.C. § 2679(b) to read in relevant part as follows:

> (b)(1) The remedy against the United States provided by sections 1346(b) and 2672 of this title for . . . personal injury . . . resulting from the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his . . . employment is exclusive of any other civil action or proceeding for money damages . . . against the employee whose act or omission gave rise to the claim . . . . Any other civil action or proceeding for money damages arising out of . . . the same subject matter against the employee . . . is precluded . . . .

Section 6 of that Act amended 28 U.S.C. § 2679(d) to provide in subdivision (4) thereof that:

> . . . any action against the United States filed pursuant to section 1346(b) of this title . . . *shall be subject to the limitations and exceptions applicable to those actions*. (Emphasis added).

Pursuing the reference to 28 U.S.C. § 1346(b) reveals that that section provides in relevant part:

> (b) Subject to the provisions of chapter 171 of this title, the district courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, . . . for . . . personal injury . . . caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his . . . employment . . . .

To complete the statutory analysis, it only remains to be noted that chapter 171 of title 28 of the United States Code contains within it § 2680(h) which provides that § 1346(b) shall not apply to any claims arising out of libel, slander and other intentional torts.

With this statutory framework clearly in mind, I turn to a consideration of *United States v. Smith,* 499 U.S. 160 (1991). The issue before the Court in that case was stated to be "whether the Liability Reform Act immunizes Government employees from suit even when an FTCA exception precludes recovery against the Government." 499 U.S. at 165. In deciding that the Act confers such immunity, the Court based its conclusion upon sections 5 and 6 of the Liability Reform Act, i.e. 28 U.S.C. §§ 2679(b)(1) and 2679(d)(4), respectively. As mentioned above, section 2679(b)(1) provides that an action against the Government under the FTCA is the exclusive remedy and precludes an action against the employee acting within the scope of his employment. Section 2679(d)(4) provides that actions against the Government pursuant to § 1346(b) (the FTCA) are "subject to the *limitations and exceptions* applicable to those actions." The Court then went on to say:

> One of these "exceptions"—expressly designated as such under § 2680—is the provision barring Government liability for [libel and other intentional torts. § 2680(h)].

499 U.S. at 166.

It is the "limitations and exceptions" language in § 2679(d)(4) of the Westfall Act which persuaded the Court that Congress intended to immunize federal employees acting within the scope of their employment even if there is no remedy against the United States.[1]

It is significant to note that 28 U.S.C. § 2680 reads: "The provisions of this chapter *and section 1346(b) of this title* shall not apply to" a wide variety of claims, including libel. (Emphasis added). As has been indicated, § 1346(b) authorizes actions against the United States "*[s]ubject to the provisions* of chapter 171"—that is to say—subject to the exceptions listed in § 2680. A specific reference to the opening clause in § 2680 was superfluous given the *Smith* Court's reliance on § 2679(d)(4) which referenced § 1346(b) which embraced § 2680 and all the other sections of chapter 171. The statutory route leading to this conclusion,

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[1]The Court also noted that 28 U.S.C. § 2679(b)(2) provides that the FTCA is *not* the exclusive remedy in a *Bivens* action in which the plaintiff seeks damages for a "constitutional tort" committed by a federal employee or in an action pursuant to a federal statute that authorizes an action against a federal employee, and concluded that Congress knew how to preserve tort liability of federal employees when it desired to do so and that inferring a third exception for intentional torts was not warranted. 499 U.S. at 166-67 (*citing Andrus v. Glover Construction Co.*, 446 U.S. 608, 616-17 (1980) ("Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent.")).

although somewhat circuitous, is nevertheless clearly marked.

Second, I do no agree with that portion of Section V of the court's opinion which holds that "in the absence of a certification by the Attorney General, the statute permits the court to certify . . . § 2679(d)(3)." Insofar as that statement suggests that the statute authorizes the court to certify *sua sponte*, I find nothing in § 2679(d)(3) which supports it. That statute provides, in relevant part, as follows:

> (3) In the event that the Attorney General has refused to certify scope of . . . employment under this section, the employee may at any time before trial petition the court to find and certify that the employee was acting within the scope of his . . . employment . . . . A copy of the petition shall be served upon the United States in accordance with the provisions of Rule 4(d)(4) of the Federal Rules of Civil Procedure . . . .

Although the statute does not authorize a *sua sponte* certification by the court, I would nevertheless find the requirement for a certification by the Attorney General provided pursuant to §§ 2679(d)(1) and (2) was satisfied here. The record reflects that the district court ordered the United States Government to show cause why the United States should not be substituted as the party defendant in the action pursuant to 28 U.S.C. § 2679. In a letter response the Government asserted that the FTCA precluded recovery against the government employee where the Government itself would be immune from suit after citing 28 U.S.C. §§ 2679(b)(1), 2679(d)(4) and *United States v. Smith, supra.* The letter went on to state that:

> As a result, sovereign immunity is extended to protect the government employee from personal liability arising while acting within the scope of his employment. Accordingly, in the instant case, the plaintiff cannot seek to sidestep the language and purpose of the Act by seeking recovery against these private defendants.

The Government then requested that it not be substituted as the party defendant because "substitution would not advance the litigation in any meaningful way and would only delay the required dismissal of this action."

A "certification" is defined as a "formal assertion in writing of some fact." *Black's Law Dictionary* 206 (5th ed. 1979). To regard the letter of the United States Attorney as anything other than an assertion and thus a certification that the defendants were employees acting within the scope of their employment would be to exalt form over substance.[2]

I am constrained to disagree as well with the majority's view that the defendant's brief in response to the order to show cause which referred to AFS and Marshall as Government employees acting within the scope of their employment was sufficient compliance with the certification requirement imposed by 28 U.S.C. § 2679(d)(3). *See* f.n. 3, *supra*. Although permitting an employee to petition the court at any time before trial to find and certify that he was acting within the scope of his employment, the statute also requires that "[a] copy of the petition shall be served upon the United States in accordance with the provisions of Rule 4(d)(4) of the Federal Rules of Civil Procedure." That Rule,

[2]The Government's request that it not be substituted as the party defendant in the interests of judicial expediency should have been denied. 28 U.S.C. § 2679(d)(1). That procedural misstep, even if it had been avoided, would not have affected the result in any event.

as it was then in effect,[3] provided that service upon the United States is made by delivering a copy to the local United States Attorney *and* by sending a copy by registered or certified mail to the Attorney General of the United States at Washington, D.C. Thus, service upon both the local United States Attorney *and* the Attorney General is required. *See McGregor v. United States*, 933 F.2d 156 (2d Cir. 1991). In its footnote 4, the majority would hold that the brief of AFS and Marshall served as a "petition" which the Government could have disregarded or moved to set aside but chose, instead, "to waive the defect in service and defend on the merits against being substituted." Assuming that the brief may be regarded as a petition (which I would question),[4] the record does not reflect that it was ever served upon the Government and hence could have been disregarded or made the object of a motion to set it aside. The

[3]Effective December 1, 1993, the provisions of Rule 4(d)(4) are now to be found in Rule 4(i)(1)(A) and (B).

[4]The only references to the matter in the brief of AFS and Marshall are to the Government's response to the Order to Show Cause, viz., at JA 150a:

> Because Captain Marshall and AFS are Government employees acting within the scope of their employment, plaintiff cannot sue for libel. (*See* United States' Brief at 3.)

At JA 154a the defendants' brief reads:

> Plaintiff also claims that the United States has not certified that defendants were acting within the scope of their employment and, therefore, the Government cannot be substituted as a party defendant. The United States in its brief recognized that defendants are Government employees acting within the scope of their employment:
>
> > The [FTCA] also requires that this action be dismissed as against the private defendants. The [FTCA] is the exclusive means of recovery for a tort claim arising from an act of a Government employee acting within the scope of his employment.

(Footnote continued on next page.)

record is plainly barren of any suggestion that service was made upon the Attorney General in Washington, D.C. There is no indication in the record that the Government was ever even aware of the service requirement let alone that it was defective. The majority can, therefore, only speculate that the Government waived the defect or chose to "defend on the merits" in a matter to which it was never made a party but merely showed cause why it would not be. In any event, it is well settled that the United States Attorney has no power to waive any conditions or limitations imposed by statute for suits against the United States. *Munro v. United States*, 303 U.S. 36, 41 (1938); *Battaglia v. United States*, 303 F.2d 683 (2d Cir.), *cert. dismissed*, 371 U.S. 907 (1962); *City of New York v. McAllister Brothers*, 177 F. Supp. 679 (S.D.N.Y. 1959), *aff'd*, 278 F.2d 708 (2d Cir. 1960); *Fugle v. United States*, 157 F. Supp. 81 (D.C. Mont. 1957).

(Footnote continued.)

> (United States' Brief at 3.) The United States, therefore, takes the position that AFS and Captain Marshall acted within the scope of their employment and that the action must be dismissed.

It would appear that the defendants' argument relies upon the Government's assertion as a certification that they were employees acting within the scope of their employment. The only other allusion in their brief which can be dubiously characterized as a petition appears at JA 154a-155a:

> Moreover, even where the United States refuses to certify that persons are employees of the Government acting within the scope of their employment, the FTCA "permits the employee to seek a judicial determination that he was acting within the scope of his employment." 28 U.S.C. § 2679(d)(3); Smith, 111 S. Ct. at 1184 n. 5. Once this Court makes such a ruling, plaintiff's claim of libel against AFS and Captain Marshall must be dismissed as a matter of law. 28 U.S.C. § 2679(b)(1).

APPENDIX B—Opinion and Order of the United States District Court, Eastern District of New York dated August 27, 1993.

Memorandum and Order of Hon. Sterling Johnson, Jr., Dated August 27, 1993 (Pages 162a-170a)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

B&A MARINE CO., INC.

Plaintiff,

- against -

AMERICAN FOREIGN SHIPPING CO., INC. and HARRY W. MARSHALL,

Defendants.

MEMORANDUM AND ORDER
89-CV 0788 (SJ)

APPEARANCES:

For the Plaintiff: CHARLES HAYDON, ESQ.
Dublirer, Haydon, Straci & Victor
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New York, New York 10005

For the Defendants: ROBERT CROTTY, ESQ.
Kelley Drye & Warren
101 Park Avenue
New York, New York 10178

Plaintiff B&A Marine Co., Inc. commenced this diversity action against Defendants American Foreign Shipping Co.,

Inc. and Harry W. Marshall for defamation. Defendants move for 1) an order granting summary judgment, and dismissing the complaint, pursuant to Fed. R. Civ. P. ("Rule") 56 and 2) an order pursuant to Fed. R. Civ. P. 15(a) for leave to amend their answer to plead affirmative defenses. For the reasons stated below, Defendant's motion for summary judgment is granted.

I. BACKGROUND

On August 1, 1984, the United States Department of Transportation, Maritime Administration ("MARAD"), and American Foreign Shipping Co., Inc. ("AFS"), represented by its president, Captain Harry W. Marshall ("Marshall"), entered into a service agreement. Under this agreement, AFS would act as MARAD's general agent in managing and conducting the maintenance and repair of ships for the "Ready Reserve Force" ("RRF").[1] In September 1987, B&A commenced repair work on two RRF ships, the S.S. Cape Ann and S.S. Cape Avinof, after successfully bidding on the contract with MARAD.

In January 1988, after having already commenced work on the two ships, B&A expressed to AFS and MARAD that it was unable to meet its deadline and was experiencing prohibitive cost overruns. All three parties met on February 1, 1988 to discuss the problems B&A was having in meeting its contractual obligations. After this meeting, Marshall sent a letter dated February 3, 1988 to B&A stating in relevant part:

> In the event that you are unable to immediately provide assurances satisfactory to us as to your ability and resources to complete the Contracts on the subject vessels, we consider it prudent to alert your

> bonding companies of the possibility of default in the performance of the Contracts.

Captain Marshall sent his draft to George Howard Thurbon ("Thurbon") of MARAD for review and revision. MARAD added the following language:

> B&A Marine Co., Inc. has placed itself in a default situation by falling behind the contract schedule. MARAD is hereby notifying the appropriate insurance companies by copy of this letter that B&A Marine Co., Inc. is in default of its contract obligations.

On or about February 9, 1989, MARAD telecopied the redrafted letter to Marshall with instructions to incorporate MARAD's changes and to retype the letter on AFS stationery. Marshall retyped the letter and sent it back to MARAD. Thurbon reviewed the letter and directed Marshall to sent it to B&A and its bonding companies.

II. ANALYSIS

Standard for summary Judgment

Defendants Marshall and AFS move for summary judgment pursuant to Rule 56. Summary Judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The court's function is not to resolve disputed issues of fact, but only to determine whether there is a genuine issue to be tried. *Anderson v.*

Liberty Lobby, Inc., 477 U.S. 242, 249 (1986); *Eastman Machine Co. v. Unites States*, 841 F.2d 469, 473 (2d Cir. 1988). No genuine issue exists

> unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted.

Anderson, 477 U.S. at 249-50 (citations omitted). In making this determination, the court is required to view the evidence in the light most favorable to the nonmoving party. *Adickes v. S.H. Kress and Co.*, 398 U.S. 144, 157 (1970).

> [A] party seeking summary judgment always bears the initial responsibility of informing the district court of the basis of its motion, and identifying those portions of "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any," which it believes demonstrate the absence of a genuine issue of material fact.

Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986) (quoting Fed. R. Civ. P. 56(c)). In addition, summary judgment is appropriate against a nonmovant who, after adequate time for discovery, fails to establish the existence of an element that is essential to his case and on which he will bear the burden of proof at trial. *Id.* at 322; *United States v. Pilot Petroleum Associates, Inc.*, 712 F. Supp. 1077, 1081 (E.D.N.Y. 1989).

A. Immunity for Federal Employees under FTCA

Defendants Marshall and AFS contend that they are entitled to summary judgment because they are immune from suit as they are federal employees for the purposes of the Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 2671 *et. seq*. Sovereign immunity shields the Government, and its employees, from liability. Under the FTCA, the Government relinquishes its sovereign immunity for certain tortious acts of the Government and its employees, thereby enabling an injured party to bring suit against the Government, but not its employees. The Government has not waived its sovereign immunity for libel and slander. 28 U.S.C. § 2680(h). Where the Government has not relinquished its sovereign immunity, the FTCA precludes any action for damages against the Government or its employees. *United States v. Smith*, 111 S.Ct. 1180 (1991).

For the purposes of the FTCA, employees of the United States are "[p]ersons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States with or without compensation." 28 U.S.C. § 2671. Here, MARAD, a federal agency, hired AFS and Marshall to serve as its general agent in managing the overhaul of RRF ships. Thus, Marshall and AFS are clearly "employees of the United States."

The only question remaining is whether AFS and Marshall were acting in the scope of their employment at the time the allegedly libelous letter was drafted. Notwithstanding the fact that the Government has not certified that AFS and Marshall were employees acting within the scope of their employment pursuant to 28 U.S.C.A. § 2679, this Court may issue a ruling to that effect. Defendants have submitted an affidavit from George Howard Thurbon stating that MARAD inserted the allegedly libelous language

and directed Marshall to send letter to B&A's bonding companies. Plaintiffs have failed to put forth any affirmative evidence creating an issue of fact on this matter. B&A merely makes conclusory statements that it can prove that the Defendants did not act in the course of their employment. Based upon the evidence submitted, the Court must conclude that Marshall and AFS were acting in the scope of their employment and are therefore immune from suit.

III. CONCLUSION

For the reasons stated above, the motion for summary judgment is hereby granted.

s/Sterling Johnson, Jr.
Sterling Johnson, Jr.
United States District Judge

Dated: Brooklyn, New York
August 27, 1993

FILED
In Clerk's Office
U.S. District Court, N.Y.
September 2, 1993

[1]The RRF is comprised of ships that can be used for defense purposes in time of national emergency.

APPENDIX C - Opinion on Rehearing of the United States Court of Appeals, Second Circuit Dated June 24, 1994.

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 24 day of June one thousand nine hundred and ninety-four.

B & A MARINE CO., INC.,

Plaintiff-Appellant,

-v.-

AMERICAN FOREIGN SHIPPING CO., INC., AND HARRY W. MARSHALL,

Defendants-Appellees.

DOCKET NUMBER 93-9023

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by Appellant B & A MARINE CO. INC.,

Upon consideration by the panel that decided the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

SO ORDERED:
FOR THE COURT,
GEORGE LANGE III, CLERK
By: s/Kathy Brower
Kathy Brower, Operations Mgr.
6-24-94
(Date)

UNITED STATES COURT OF
APPEALS
SECOND CIRCUIT
FILED JUNE 24 1994
GEORGE LANGE III, CLERK

APPENDIX D—Constitution and Statutory Provisions

Constitution, Amendment V

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; ... nor be deprived of life, liberty or property, without due process of law;"

Title 28 USC § 2671, Paragraph 1

> § 2671. Definitions
>
> As used in this chapter and sections 1346(b) and 2401(b) of this title, the term "Federal agency" includes the executive departments, the judicial and legislative branches, the military departments, independent establishments of the United States, and corporations primarily acting as instrumentalities or agencies of the United States, but does not include any contractor with the United States.

Title 28 USC § 2674, Paragraph 1

> The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstance, but shall not be liable of interest prior to judgment or for punitive damages.

Title 28 USC § 2679 (a)

> (a) The authority of any federal agency to sue and be sued in its own name shall not be construed to authorize suits against such federal agency on claims which are cognizable under section 1346(b) of this title, and the remedies provided by this title in such cases shall be exclusive.

Title 28 USC §2679 (d) (1)

> (d)(1) Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a United States district court shall be deemed an action against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant.

Title 28 USC § 2679 (d) (3)

> (3) In the event that the Attorney General has refused to certify scope of office or employment under this section, the employee may at any time before trial petition the court to find and certify that the employee was acting within the scope of his office or employment. Upon such certification by the court, such action or proceeding shall be deemed to be an action or proceeding brought against the United States under the provisions of this title and all references thereto, and the United States shall be

substituted as the party defendant. A copy of the petition shall be served upon the United States in accordance with the provisions of Rule 4(d)(4) of the Federal Rules of Civil Procedure. In the event the petition is filed in a civil action or proceeding pending in a State court, the action or proceeding may be removed without bond by the Attorney General to the district court of the United States for the district and division embracing the place in which it is pending. If, in considering the petition, the district court determines that the employee was not acting within the scope of his office or employment, the action or proceeding shall be remanded to the State court.

Title 28 USC § 2680 (h)

The provisions of this chapter and section 1346(b) of this title shall not apply to—

(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights: Provided, That, with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter and section 1346(b) of this title shall apply to any claim arising, on or after the date of the enactment of this proviso, out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution. For the purpose of this subsection, "investigative or law enforcement officer" means any officer of the United States who is empowered by law to

execute searches, to seize evidence, or to make arrests for violations of Federal law.

Federal Rule of Civil Procedure 56 (f)

(f) When Affidavits are Unavailable. Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

OPPOSITION

BRIEF

Supreme Court, U.S.
FILED
OCT 6 1994
OFFICE OF THE CLERK

No. 94-268

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

B & A MARINE CO., INC,

Petitioner,

vs.

AMERICAN FOREIGN SHIPPING CO., INC., and HARRY W. MARSHALL,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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BEST AVAILABLE COPY

17 pp

QUESTION PRESENTED

Whether the Court should review the holdings of the Court of Appeals for the Second Circuit that defendants were employees of the United States acting within the scope of their employment, that the United States had not waived its right to be sued for libel and that, therefore, the complaint, which alleged libel, was correctly dismissed?

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No. 94-268

IN THE

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OCTOBER TERM, 1994

B & A MARINE CO., INC.,

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AMERICAN FOREIGN SHIPPING CO., INC., and HARRY W. MARSHALL,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit (Pet. App. 1a) is reported at 23 F.3d 709 (2d Cir. 1994). The order of the United States District Court for the Eastern District of New York is located at Pet. App. 22.

JURISDICTION

The judgment of the United States Court of Appeals for the Second Circuit was entered on May 4, 1994 and a petition for rehearing and for rehearing *in banc* was denied on June 24, 1994.

Respondent received the petition for a writ of certiorari on August 3, 1994 and received an extension of time in which to respond to and including October 3, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF SUBSIDIARIES

Respondent American Foreign Shipping Co., Inc., a New Jersey corporation, has no corporate parents or subsidiaries.

STATEMENT OF THE CASE

On August 1, 1984, Respondent American Foreign Shipping Co., Inc. ("AFS") through its president, Respondent Harry W. Marshall, entered into a "Service Agreement" with the United States Department of Transportation, Maritime Administration ("MARAD"). (Pet. App. 3a.) The Service Agreement provided that the United States through MARAD "appoints the General Agent [i.e. AFS] as its agent, and not as an independent contractor, to manage and conduct the business" of United States' ships in the Ready Reserve Force ("RRF") of the National Defense Reserve Force. (*Id.* at n.1.) The RRF is comprised of ships that can be used for defense purposes in times of war or national emergency. The S.S. Cape Ann and the S.S. Cape Avinof were two of the ships assigned to AFS under the Service Agreement. (Pet. App. 3a.)

As MARAD's General Agent, AFS ". . . promises so to manage and conduct the business for the United States in accordance with such directions, orders or regulations not inconsistent with its Agreement as the United States has prescribed. . . ." Pursuant to the Service Agreement, Article 4(i), MARAD assigned an employee to "observe and report on the activities" of each ship and monitored AFS' performance on a daily basis. Captain Marshall and AFS reported to George Howard Thurbon ("Thurbon"), a Supervisory Marine Surveyor for MARAD, with respect to all their activities. (Pet. App. 9a.)

In September 1987, Petitioner B&A Marine Co., Inc. ("B&A") bid for, and was awarded, a contract with MARAD to refit the

S.S. Cape Ann and S.S. Cape Avinof (the "Ship Contract"). (Pet. App. 3a.) In January 1988, however, B&A told AFS and MARAD that it was unable to meet its contractual deadlines and was experiencing prohibitive cost overruns. (*Id.*) B&A requested that a meeting of AFS, MARAD and B&A be held to discuss these issues. (*Id.*) AFS, B&A and MARAD thus met on February 1, 1988 to discuss B&A's problems. (*Id.*) Three MARAD officials, Charles Dallas, William Bryant and Ron Smith, along with Captain Marshall, attended this meeting. (*Id.*) In its statement of the case, petitioner claims that MARAD's knowledge of this meeting was limited to what Captain Marshall reported. In light of the attendance of three MARAD officials at the meeting, however, it is clear that MARAD had first hand knowledge of what was said there.

After the February 1, 1988 meeting, MARAD directed Captain Marshall to draft a letter to B&A stating that B&A was in default on its obligations and that if B&A could not provide immediate assurances that it would complete its contracts on time and within budget, MARAD would be forced to notify B&A's bonding companies about the default situation. (Pet. App. 3a-4a.) Captain Marshall drafted a letter on February 3, 1988 in response to MARAD's directions. That letter stated in part:

> In the event that you are unable to immediately provide assurances satisfactory to us as to your ability and resources to complete the Contracts on the subject vessels, we consider it prudent to alert your bonding companies of the possibility of default in the performance of the Contracts.

(Pet. App. 4a.) Captain Marshall, as required by MARAD, sent his draft letter to MARAD for review and revision.[1] (*Id.*) MARAD made extensive changes to Captain Marshall's draft, adding the language that apparently forms the basis for B&A's defamation claim. Specifically, MARAD's redraft added this language:

---

[1] All of the drafts and telecopied instructions were submitted to the district court.

> B&A Marine Co., Inc. has placed itself in a default situation by falling behind the contract schedule. MARAD is hereby notifying the appropriate insurance companies by copy of this letter that B&A Marine Co., Inc. is in default of its contract obligations.

(*Id.*) Unlike Captain Marshall's draft, MARAD's redraft: (1) states that B&A has defaulted on its contractual obligations; and (2) notifies B&A's bonding companies of this default.

On February 9, 1988, MARAD telecopied the redrafted letter to Captain Marshall with instructions to incorporate MARAD's changes, retype the letter on AFS stationery, and telecopy it back to MARAD for final review and approval. (*Id.*) Captain Marshall complied with each direction. (*Id.*) After MARAD reviewed the redrafted letter, MARAD directed Captain Marshall to send the letter to B&A, and its bonding companies, by Express Mail, so that B&A would have the letter before a meeting among B&A, AFS and MARAD, on February 11, 1988. Again, Captain Marshall followed each of MARAD's directions, signing the letter as the General Agent of United States Department of Transportation, Maritime Administration. (*Id.*)

Subsequently, B&A brought its claim for libel, alleging that the February 9, 1988 letter was false and defamatory, and caused Petitioner to suffer substantial harm. (*Id.*) Respondents moved for summary judgment on November 26, 1989.

The Decisions of the District and Circuit Court

Before reaching its decision on Respondents' motion for summary judgment, the district court directed B&A and the United States to show cause why the United States should not be substituted as the defendant in the action in place of AFS and Captain Marshall. AFS and Captain Marshall were invited to submit a response, if needed, to the submissions of B&A and the United States. (Pet. App. 5a.)

B&A responded to the district court's order on February 12, 1993 arguing against substituting the United States as a party defendant. (*Id.*) The United States submitted a letter brief asserting that the district court should dismiss the action against the United States because the United States cannot be sued for libel. The United States also asserted that the action as against AFS and Captain Marshall should be dismissed:

> The [Federal Tort Claims Act] also requires that the action be dismissed as against the private defendants. The [FTCA] is the exclusive means of recovery for a tort claim arising from an act of a Government employee acting within the scope of his employment.

(*Id.*)

After receiving these submissions, and after reviewing the evidence including the drafts of the letter and the final letter, the district court held that "MARAD, a federal Agency, hired AFS and Marshall to serve as its general agent in managing the overhaul of RRF ships. Thus, Marshall and AFS are clearly 'employees of the United States' " and "were acting in the scope of their employment" under the FTCA. (Pet. App. 26a.) The court further held that the United States has not waived its sovereign immunity for libel and slander and the FTCA precludes any action for damages against the Government or its employees. (*Id.*) *See United States v. Smith*, 499 U.S. 160 (1991). Accordingly, the district court granted defendants' summary judgment motion.

The Second Circuit affirmed:

> The evidence presented to the district court showed as a matter of law that AFS was an agent of the Government, and not an independent contractor.

(Pet. App. 8a.)

The Second Circuit also rejected B&A's argument that AFS was acting outside the scope of its employment by writing and sending the allegedly libelous letter:

> [T]he uncontradicted evidence demonstrated that, in writing the letter, AFS was carrying out the explicit instructions of its principal. Thus, it is not seriously open to dispute that the sending of the letter was within the scope of the employment.

(Pet. App. 10a.)

REASONS FOR DENYING THE WRIT

POINT I

THERE ARE NO REASONS THAT REQUIRE REVIEW OF THE SECOND CIRCUIT'S DECISION; THE SECOND CIRCUIT CORRECTLY APPLIED THE TEST SET FORTH IN *LOGUE V. UNITED STATES* IN DETERMINING WHETHER RESPONDENTS WERE EMPLOYEES WORKING WITHIN THE SCOPE OF THEIR EMPLOYMENT

Petitioner has failed to establish any reason for granting the petition. No constitutional issue exists, there is no split among the circuit courts and the circuit courts are not incorrectly applying Supreme Court precedent.

Petitioner asserts, however, that the Second Circuit misapplied Supreme Court precedent in upholding the district court's ruling that Respondents were "employees" of the government acting within the scope of their employment. This argument has no merit. Indeed, the Supreme Court should "not grant certiorari to review evidence and discuss specific facts," *United States v. Johnson*, 268 U.S. 220, 227 (1925), which is exactly what Petitioner seeks.

For purposes of the FTCA, a government employee is a person who is subject to the government's control or right to

control. *United States v. Orleans*, 425 U.S. 807 (1976); *Logue v. United States*, 412 U.S. 521, 527-28 (1973); *Leone v. United States*, 910 F.2d 46 (2d Cir. 1990); *Bushman v. Seiler*, 755 F.2d 653 (8th Cir. 1985); *Witt v. United States*, 462 F.2d 1261, 1263 (2d Cir. 1972); *see Ferguson v. United States*, 712 F. Supp. 775, 781 (N.D. Cal. 1989), *citing Brucker v. United States*, 338 F.2d 427, 428 n.2 (9th Cir. 1964), *cert. denied*, 381 U.S. 937 (1965).

In *Logue*, 412 U.S. at 527-28, this Court held that whether a party is an agent of the Government and thus an employee under the FTCA, as opposed to being an independent contractor, depends on whether the Government has the power "to control the detailed physical performance of the contractor." *Logue* also held that this should be determined pursuant to the common law of principal-agent or master-servant law as set out in the Restatement (Second) of Agency. This is exactly the standard that the Second Circuit applied in this case:

> The Restatement (Second) of Agency provides helpful guidance. It defines a servant as "an agent employed by a master to perform service in his affairs whose . . . performance of the service is controlled or is subject to the right to control by the master." *Restatement (Second) of Agency* § 2(2) (1958).

(Pet. App. 7a.)

The Court of Appeals carefully analyzed the undisputed facts and determined, as a matter of law, that MARAD exercised day-to-day control over the activities of AFS and, in particular, closely controlled the writing and sending of the letter which forms the basis for B&A's complaint. Both MARAD and the United States also recognized that Respondents were employees of the United States acting within the scope of their employment.

In an effort to avoid the FTCA's bar against bringing claims for defamation against the United States and its agents, however, B&A asserts that AFS is an independent contractor and not an agent of the United States. In support of its claim, B&A cites *Orleans*, 425 U.S. at 807; *Leone*, 910 F.2d at 46 and *Crippen*

v. Nelson Realty, 572 F. Supp. 87 (E.D.N.Y. 1983). The Second Circuit correctly applied *Logue* and *Orleans* in affirming the District Court. (Pet. App. 8a.) *Crippen* applied the same standard although in a very different factual context.

Petitioner also asserts that the Second Circuit erred in holding that Respondents acted within the scope of their employment. The Second Circuit found that Respondents were acting within the scope of their employment when they wrote and sent the letter complained of:

> It was equally clear under the evidence presented to the district court that the writing and sending of the allegedly tortious letter were within the scope of defendants' employment. This was unquestionably a part of AFS's management of the maintenance and repair of MARAD's vessels, which was precisely the task for which the agency was created. Furthermore, the uncontradicted evidence demonstrated that, in writing the letter, and in particular the allegedly libelous portion of the letter, AFS was carrying out the explicit instructions of its principal. Thus, it is not seriously open to dispute that the sending of the letter was within the scope of the employment.

(Pet. App. 10a.)

The Second Circuit's decision fits well within the accepted precedents for determining whether a person is acting within the scope of their employment. *See e.g., Barr v. Matteo*, 360 U.S. 564 (1959); *see also Sprecher v. Graber*, 716 F.2d 968, 975 (2d Cir. 1983); *Norton v. McShane*, 332 F.2d 855, 858-59 (5th Cir. 1964), *cert. denied*, 380 U.S. 981 (1965); *McManus v. McCarthy*, 586 F. Supp. 302, 304 (S.D.N.Y. 1984).

Once the district court found that Respondents were acting within the scope of their employment it properly dismissed the action against Respondents because an employee of the United States has absolute immunity from common law tort claims for

acts within the scope of his employment. 28 U.S.C. § 2679(d); *see* Federal Employees Liability Reform and Tort Compensation Act ("FELRTCA"), H.R. Rep. No. 700, 100th Cong., 2d Sess. 3-4 (1988), *reprinted in* 1988 U.S.C.C.A.N. 5945, 5946-47 (FELRTCA amended the FTCA to "remove the potential personal liability of federal employees for common law torts committed within the scope of their employment . . ."). *See also United States v. Smith*, 499 U.S. 160 (1991).

B&A cites *Horowitz v. Sears, Roebuck & Co., Inc.*, 137 A.D.2d 492, 524 N.Y.S.2d 236 (2d Dep't), *appeal denied*, 72 N.Y. 803, 532 N.Y.S.2d 368, 528 N.E.2d 528 (1988), in support of its claim that AFS and Captain Marshall acted outside the scope of their employment. In *Horowitz*, an employee of Sears spray-painted swastikas on plaintiff's appliances. Defacing appliances was in no way related to Sears' business. Thus, the court ruled that the employee acted outside the scope of his employment.

B&A also cites *Edmonstone v. Hathorne*, 19 N.Y. 9 (1859) and *Robert Reis & Co. v. Volck*, 151 App. Div. 613, 136 N.Y.S. 367 (1st Dep't 1912), for the proposition that an agent is obligated to keep its principal informed of all material facts that could affect the principal's judgment. Petitioner asserts that AFS and Captain Marshall acted outside the scope of their agency by withholding information about the February 1, 1988 meeting from MARAD. B&A submitted no evidence supporting this assertion, nor could it. Indeed, three MARAD representatives attended the meeting where B&A told AFS and MARAD that it was experiencing cost overruns and was unlikely to finish the project on time. Thus, MARAD heard B&A's contentions directly, not just from Captain Marshall.

POINT II

THE DISTRICT COURT GAVE ALL PARTIES AN OPPORTUNITY TO BE HEARD ON THE ISSUE OF WHETHER RESPONDENTS WERE EMPLOYEES OF THE UNITED STATES

B&A claims that the Second Circuit erred in upholding the district court's order granting summary judgment because the district court did not conduct an evidentiary hearing before ruling that Respondents were employees of the United States. In addition, B&A asserts that the Second Circuit by affirming this decision, has acted inconsistently with other circuits, which require an evidentiary hearing.

The FTCA "permits the employee to seek a judicial determination that he was acting within the scope of his employment." 28 U.S.C. § 2679(d)(3); *United States v. Smith*, 499 U.S. at 163. Respondents in their submission to the district court asked the court to certify them as employees acting within the scope of their employment. Thus, the issue was clearly before the court on the motion for summary judgment.

Respondents met their burden by submitting the letter and the drafts of the letter worked on by both Captain Marshall and MARAD; thus showing there was no issue of a material fact. Under *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986), the party opposing summary judgment must come forward with evidentiary facts sufficient to establish an issue of material fact, which Petitioner failed to do.[2]

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[2] Petitioner asserts that it was denied an opportunity to take discovery. In fact, petitioners never argued that MARAD did not draft the letter and instruct Captain Marshall to send it. Indeed, B&A never gave any hint about what facts it thought discovery would bring to light. Furthermore, B&A had more

(Footnote continued)

In opposition to Respondents' summary judgment motion, B&A submitted its own "evidence," none of which had any impact upon the material and incontrovertible facts at issue in this action; namely, that AFS and Captain Marshall followed the express directions and orders of their principal, MARAD.

Furthermore, the district court, before granting summary judgment directed petitioner and the United States to show cause why the United States should not be substituted. (Pet. App. 5a.) Again, petitioner had every opportunity to raise an issue of fact, if one existed. It failed to do so. On the motion, the United States and MARAD stated that Respondents were employees of the United States. (*Id.*)

Only after the briefing of the summary judgment motion, hearing oral argument on that motion and receiving submissions from the parties responding to its order to show cause, did the district court rule on the summary judgment motion. (*Id.*) The district court's decision that AFS and Captain Marshall were employees of the government acting within the scope of their employment was based on the undisputed facts that the parties put before it. For B&A to say that it was deprived of an evidentiary hearing is incorrect.

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than sufficient opportunity to take discovery and failed to do so. As the district court held:

> In addition, summary judgment is appropriate against a nonmovant who, after adequate time for discovery, fails to establish the existence of an element that is essential to his case and on which he will bear the burden of proof at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *United States v. Pilot Petroleum Associates, Inc.*, 712 F. Supp. 1077, 1081 (E.D.N.Y. 1989).

(Pet. App. 25a.)

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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